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IN THE

Supreme Court of the United States

October Term, 1949

Nos. 358

J. S. CASSELMAN, JAMES D. TOWNE, J. E. ABEL AND GEORGE HILL,

Petitioners

v.

STATE OF IDAHO

On Petition for Writs of Certiorari to the Supreme Court of the State of Idaho

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J. S. Casselman, James D. Towne, J. E. Abel and George Hill pray that writs of certiorari issue to review the judgments of the Supreme Court of Idaho, entered on May 24, 1949, affirming the judgments of the District Court of Ada County which found the petitioners guilty of violating Section 44-801 of the Idaho Code (1949) (Ch. 265, Session Laws of 1947).

OPINION BELOW

The opinion of the Supreme Court of Idaho (R. 36) is reported at 205 P.2d 1131. It has not yet been officially reported.

JURISDICTION

The judgments of the Supreme Court of Idaho were entered on May 24, 1949 (R. 53). On July 28, 1949, the Chief Justice signed an order extending the time for filing petitions for certiorari to August 31, 1949 (R. 155); on August 18, 1949, Mr. Justice Black granted an additional extension of time to and including September 29, 1949 (R. 55).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (d). The petitioners were employed in Boise, Idaho, by the Western Electric Co., a subsidiary corporation of the

Bell Telephone System engaged in the supply and installation of equipment for the operating subsidiaries of the system. The petitioners were on strike. In connection with this strike they picketed the building, in Boise, which housed the local headquarters of their corporate employer. This same building also was the place of business of the local operating subsidiary of the Bell system—the Mountain States Telephone and Telegraph Company. Their peaceful picketing caused injury to the Telephone Company, the petitioners were prosecuted and convicted for violating an Idaho statute (Idaho Code (1949) Section 44-801) which makes picketing criminal if it causes economic injury to any person not a party to a labor dispute. The petitioners contended throughout that the statute, both on its face and as applied, was violative of the Fourteenth Amendment to the Constitution of the United States. This contention was rejected by the Trial Court and, on appeal, by the Supreme Court of Idaho. The petitioners ask that this Court review, by certiorari, the decision of the Idaho Supreme Court on the Federal questions thus presented.

QUESTIONS PRESENTED

1. Whether a state may make it a crime to picket peacefully wherever there is no "labor dispute" involved.

2. Whether a state may make it a crime, where there is a "labor dispute," for the employees involved in that dispute to picket a separately incorporated branch of the industrial enterprise in which they are employed.

3. Whether a state may make it a crime for employees to picket peacefully the premises of their own employer because that picketing causes economic injury to a corporate affiliate which occupies the same premises.

4. Whether a state statute which makes it a crime to cause any injury by picketing to a person not involved in a dispute "between an employer and a majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives" is unconstitutionally indefinite and uncertain.

STATUTES INVOLVED

Section 44-801 of the Idaho Code (1949) (Ch. 265, Session Laws of 1947) provides, in part, as follows:

> "Section 1. Secondary Boycott. It shall be unlawful to cause or threaten to cause, and/or combine or conspire to cause or threaten to cause, injury to one not a party to the particular labor dispute, to aid which such boycott is initiated or continued, whether by (a) withholding patronage, labor, or other beneficial business intercourse; (b) picketing; . . ."

Section 44-712 of the Idaho Code (1949) (Ch. 266, Session Laws of 1947), a portion of the civil statute governing the issuance of injunctions in labor disputes, defines "labor dispute" as follows:

> "The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives."

STATEMENT

The American Telephone and Telegraph Company, through its 23 subsidiary corporations, owns and operates a unified nation-wide telephone system called the Bell System (R. 11-12). The day-to-day operation of this system is divided geographically among a number of regional telephone companies, but supply and installation of equipment throughout the system is handled by the installation department of a single, separate company—the Western Electric Co. (hereafter called the Electric Co.). The regional telephone companies and the Electric Co. are separate but subsidiary corporations, all owned in large part and controlled completely by the American Telephone and Telegraph Co.[1]

The petitioners are employed in the installation department of the Electric Co. in Boise, Idaho. Their work, in Boise, is

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[1] A. T. & T. owns 99.81% of the capital stock of the Electric Co. and 73.35% of the capital stock of the Mountain States Telephone and Telegraph Co. (R. 12).

the installation of exchange equipment for the local operating subsidiary of the Bell System—the Mountain States Telephone & Telegraph Co. (hereafter called the Telephone Co.). Both the Telephone Co. and the Electric Co. have their headquarters for the Boise area in a building in Boise called the Telephone Building (R. 16).

On April 7, 1947, the National Federation of Telephone Workers called a nation-wide strike of all of the employees of the Bell System. In Boise, the employees of both the Telephone Co. and the Electric Co. went on strike. (R. 14-15). The Federation sought to bargain with the American Telephone and Telegraph Co. on a nation-wide scale, but the Company refused to do so except as to long-distance operators. Because of this refusal, the strike was settled piecemeal as a result of negotiations between the 23 subsidiary corporations of the Bell System, on the one hand, and the various subordinate Unions of the National Federation, on the other. (R. 15).

On May 15, 1947 a settlement was reached by the Mountain States Telephone & Telegraph Co. and its employees, represented by the Mountain States Federation of Telephone Workers. The dispute between the Western Electric Co. and the employees in its installation department, represented by the Association of Communication Equipment Workers, continued, however, until May 21, 1947. In this interval between the two settlements the peaceful picketing which the State of Idaho has called criminal took place.

Prior to May 15, 1947, the employees of both the Electric Co. and the Telephone Co. had peacefully picketed the single building in Boise which housed both of their corporate employers (R. 17). On May 15, after the settlement of the Telephone Co. strike, the employees of the Telephone Co. ceased picketing (R. 18). The employees of the Electric Co., however, including the petitioners, continued to picket the building in which they worked and in which their employer's local headquarters was located. Because this building also housed the Telephone Co., and the Telephone Co. was therefore injured by the picketing, the petitioners were arrested and each was charged (R. 3) with violating Ch. 265 of the 1947 Session Laws (Idaho Code (1949) Section 44-801).

The pertinent terms of Ch. 265 provide that:

> "It shall be unlawful to cause . . . injury to one not a party to a particular labor dispute, . . . by picketing; . . ."

The complaints upon which the petitioners were tried charged simply that the petitioners were engaged in a labor dispute with the Electric Co. and not with the Telephone Co. and that in order to compel the Electric Co. to comply with their demands they had picketed the building in which the Telephone Co. had its office, thereby causing injuries to the Telephone Co. (R. 3).

The petitioners demurred to the complaints (R. 6), claiming (1) that the charge based on the statute constituted an infringement of the right of free speech, guaranteed by the Federal and State constitutions and (2) that the statute was unconstitutional because it did not define the criminal offense with sufficient certainty so that a defendant could determine, at the time he acts, whether his action would constitute a violation of the law. The District Court overruled the demurrers (R. 9) and the cases went to trial. A jury was waived and the facts were stipulated. The petitioners reiterated the contentions above stated but the trial again overruled them and returned a verdict of guilty (R. 19).

On appeal, the Supreme Court of Idaho affirmed (R. 36), the Chief Justice dissenting (R. 51). In that Court, for the first time, the lack of a definition of "labor dispute" in Ch. 265 was remedied. The Court seemed to agree inferentially that Ch. 265, a criminal statute, would be unconstitutionally uncertain unless some standard were set up by which a picketer could determine in advance whether the dispute which led him to picket was properly a "labor dispute." It found such a standard in a civil statute which had been passed at the same time as Ch. 265—Ch. 266 of the 1947 Session Laws (Idaho Code (1949) Section 44-712).

Ch. 266 is an amendment to Idaho's anti-injunction statute. That statute provides, in general, that injunctions shall not be issued by courts of equity in labor disputes except under certain specific circumstances. Ch. 266 amends the portion of

the anti-injunction statute which defines "labor dispute." It provides that "the term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives." This definition, the Court said, was in *pari materia* with Ch. 265, the criminal statute outlawing picketing, and should, therefore, be read into Ch. 265.

The Supreme Court of Idaho took cognizance of the petitioner's contention that the statute, so construed as to make criminal any picketing not arising out of a dispute between an employer and a majority of his employees in a collective bargaining unit, was unconstitutional as a deprivation of freedom of speech. But it read the decision of this Court in *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722, as limiting the constitutional protection of picketing to picketing by employees directly employed by the person picketed.

The petitioners next contention, that the petitioners were in fact picketing their own employer in the only way in which they could do so, the Court answered by noting that the placards carried by the pickets did not specifically state that the dispute was limited to the Electric Company and by ruling that the petitioners

> "had no right to picket in such a way as to injure someone else not a party to [the] labor dispute. . . .
>
> "If legal picketing necessitates its being carried on before a common entrance used by employers and their employees not parties to the labor dispute with which the picketing is being carried on, it must be so conducted as not to cause damage to such other employers; otherwise it violates Chapter 265, supra," (R. 48-49).

REASONS FOR GRANTING THE WRIT

1. Ch. 265 of the Sessions Laws of 1947, the Idaho criminal statute under which the petitioners were convicted, is clearly unconstitutional on its face under the principles established by this Court in the line of cases beginning with *Senn* v. *Tile Layers Union*, 301, U. S. 468. This is a sufficient reason for granting of certiorari and the reversal of the conviction below.

Thornhill v. *Alabama*, 310 U. S. 88 and *Carlson* v. *California*, 310 U. S. 106 expressly so hold.

The statute is not merely a secondary boycott statute, although it is so entitled.[*] The pertinent words of the statute, as stated by the Supreme Court of Idaho (R. 48) are these:

> "It shall be unlawful to cause . . . injury to one not a party to the particular labor dispute . . . by picketing; . . ."

The criminal act thus defined has nothing to do with secondary boycotts. The crime is the causing of injury by picketing. An intention to cause injury is not required. Nor is the nature, purpose or intent of the picketing material. The peaceful and truthful dissemination of information by picketing, carried on by a lawful combination for a lawful purpose, is made a crime by this statute if it has the effect of causing economic injury "to one not a party to the particular labor dispute." And a "labor dispute" is defined as a dispute concerning collective bargaining between an employer and a majority of his employees in a collective bargaining unit.

Such a statute is clearly unconstitutional on its face. This Court has repeatedly held that peaceful picketing cannot be limited by a state to the immediate participants in a "labor dispute." This was first clearly held in *A. F. of L.* v. *Swing*, 312 U. S. 321, 325, where Mr. Justice Frankfurter, for the Court, said flatly that a decree enjoining peaceful picketing based on "the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him" was unconstitutional.

In *Bakery & Pastry Drivers* v. *Wohl*, 315 U. S. 769, 774, Mr. Justice Jackson, for the Court, said, in words directly applicable to the Idaho statute:

> "one need not be a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to

[*] As the Attorney General of the State of Idaho noted, in his brief below, "the application of such nomenclature does much to confuse the issues presented by this appeal. While it is true that the statute is twice denominated a 'secondary boycott act,' we think that it is also true that the element and gravamen of the offense charged may only be determined by an examination of the language of the act itself."

> express a grievance in a labor matter by publication unattended by violence, coercion or conduct otherwise unlawful or oppressive."

Again, in *Cafeteria Employees* v. *Angelos*, 320 U. S. 293, 296, a unanimous court held, in an opinion by Mr. Justice Frankfurter, that

> "A state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way 'by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him' *A. F. of L.* v. *Swing*, 312 U. S. at 326."

That the Idaho statute is an unconstitutional limitation on speech is clear not only from the language of the *Swing, Wohl* and *Angelos* cases but from one simple fact: *the picketing which this Court held could not constitutionally be enjoined in those cases could have been punished as a crime under the Idaho statute.*

In the *Swing* case, a union picketed Swing's beauty parlor in order to organize it. There was no "labor dispute" between Swing and his employees. The picketing—according to the admitted facts—caused irreparable injury to Swing and to his employees,[*] but this Court held that it could not constitutionally be enjoined. Under the Idaho statute, the very same picketing would be a crime.

In the *Wohl* case, the Union tried to persuade non-union peddlers to employ a union man once a week. In order to do so they picketed both the peddlers, who had no employees, and the bakery which supplied the peddlers. This Court held that such picketing could not constitutionally be enjoined. Yet the same picketing, if it caused anyone not to patronize the peddlers or the bakeries, would be a crime under the Idaho statute.

In the *Angelos* case a labor union picketed a cafeteria which was operated by the owners without the aid of any

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[*] The complaint in the *Swing* case, the facts alleged in which were taken as true, charged that the picketing caused Swing "to lose business prestige and large sums of money, all to his injury." Record, *A. F. of L.* v. *Swing*, No. 56, October Term, 1940, p. 8.

employees. There was thus no "labor dispute." The picketing caused damage to the owners, and the Trial Court found that, if it were not restrained, "the owners would suffer irreparable damage and may find their business ruined. . . ."[4] This Court held unanimously that an injunction against the picketing was unconstitutional. The very same picketing would be criminal under the Idaho statute.

The Idaho Supreme Court seemed to believe that these clear and unequivocal rulings were belied by the decision of the majority of the court in *Carpenters and Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722, decided on the same day as the *Wohl* case.[5] This was a complete misreading of the *Ritter* case. In that case a majority of the Court sustained an injunction against picketing for the very reason that the basis for the injunction was *not* the non-existence of a "labor dispute" but the absence of any industrial nexus between the person picketed and the person with whom the picketers were in controversy. Yet the Idaho Supreme Court, in sustaining the present statute said (R. 48) that the rule of the *Ritter* case was that picketing was constitutionally protected only if the nexus between the dispute and the employer picketed was "such as to make the one actually a party to the labor dispute."

The Idaho Court also quoted and relied on *Giboney* v. *Empire Storage and Ice Company*, 336 U. S. 490. The Giboney case is entirely irrelevant. In *Giboney* the purpose of the picketing which was enjoined by the Missouri courts was "to effectuate the purposes of an unlawful combination" and the Court merely held that action taken pursuant to that unlawful combination could not claim protection because it was, in part, carried out by means of language.

The Court in the *Giboney* case particularly emphasized that the injury from the picketing there involved was not limited to the person picketed. Since the picketing was merely an instrument used to obtain an objective unlawful under the

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[4] Record, *Cafeteria Employees* v. *Angelos*, No. 36, October Term, 1943, p. 27.

[5] The Idaho Court said (R. 46) that the *Ritter* case, 315 U. S. 722 (Mar. 30, 1942) was the "latest expression of the Supreme Court." But cf. *Cafeteria Employees* v. *Angelos*, 320 U. S. 293 (Nov. 22, 1943), above quoted.

anti-trust laws of Missouri, the State had an interest in the controversy. A violation of the anti-trust laws would be an injury to the State and picketing to force such a violation, the Court held, could therefore be enjoined.

The Idaho statute here involved is diametrically opposed to the philosophy of the *Giboney* case. The injury which makes picketing criminal is not injury to the state, or participation in an unlawful combination. To the contrary, picketing *per se* is a crime if it causes private injury to "any one not a party to the particular labor dispute." Purpose is irrelevant. If a "labor dispute" does not exist any effective picketing is a crime, irrespective of the lawfulness of its objective or the manner in which it is carried on. This, we submit, is an unconstitutional restriction on speech, under the explicit decisions of this Court.

It will not do to say that it is not the picketing which is here made criminal but only the causing of injury by picketing. Picketing will always cause economic injury if it is effective. The purpose of picketing, as a form of speech in industrial disputes, is not the satisfaction of a desire to enunciate. Pickets do not walk for exercise. They hope to accomplish something—to publicize the existence of a controversy and thus to persuade third persons to refrain from entering or doing business on the premises picketed. Any effective picketing will cause economic injury. A flat prohibition against the causing of injury by picketing would clearly constitute a prohibition of all effective picketing; a statute which prohibits the causing of injury by picketing in the absence of a "labor dispute" is, in substance, a statute making all effective picketing criminal in the absence of a "labor dispute."

The injury factor, furthermore, was present in the very cases in which this court said that picketing could not be enjoined. An injunction, after all, cannot be issued to an employer simply because he is picketed. As a matter of equity practice, he generally must allege that he will be injured by the picketing, indeed, in most cases, that he will be irreparably injured. And, in the *Swing* and the *Angelos* cases such allegations were made and proven. The Court nevertheless held that injunction of the picketing would be an unconstitutional

restraint on freedom of speech. Surely a statute which provides for criminal punishment under identical circumstances is even more clearly a violation of the Fourteenth Amendment.

2. The prohibition contained in the Idaho statute of any picketing causing injury in the absence of a "labor dispute" is, as stated above, plainly unconstitutional and is a sufficient reason for the granting of certiorari and the reversal of the decision of the Court below upholding the statute. The statute, however, goes even further. It can be applied to make picketing which *does* grow out of a "labor dispute" criminal because that picketing causes economic injury to one not a party to the dispute. And the statute was so applied in these cases.

There can be no question that there was a "labor dispute" between the Electric Co. and the petitioners. But the petitioners were, nevertheless, convicted of crime because they peacefully picketed. They were so convicted because their picketing caused injury to the Telephone Co., a corporate affiliate of their employer, in whose building and on whose equipment the petitioners had been working.

As we shall show below the petitioners in fact picketed their own employer, the Electric Co., in the only way in which they could do so. But even if we assume that they picketed the Telephone Co., *qua* Telephone Co., rather than the Electric Co., we submit that they could not constitutionally be punished for doing so, under any statute.

This Court, in *Ritter's Cafe,* did say that a state may limit the dissemination of publicity about a labor dispute by picketing to "the industry within which a labor dispute arises." *Carpenters & Joiners* v. *Ritter's Cafe,* 315 U. S. 722, 728. But in the *Wohl* case it said that employees had a constitutional right to follow the subject matter of their dispute and to picket persons with whom they were not in direct dispute but who supplied materials to those with whom they were in dispute.

Surely, the industrial connection which the Court found in the *Wohl* case was a gossamer thread compared to the financial and operational integration of the Telephone Co. and the Electric Co. here. It is not merely that the two corporations are both subsidiaries, owned and controlled by the American

Telephone and Telegraph Co. More significant is the fact that the Electric Co.'s activities here involved were part and parcel of the operation of the Bell System. Picketing of the Telephone Co. by the employees of the Electric Co. would not have been merely "following the subject matter of the dispute"—as in the *Wohl* case. It would have been picketing of the business in which, in a real and economic sense, the petitioners were employed.

The petitioners were employed to work in the Telephone Building and to install equipment for the Telephone Co. To be sure, they were not employed directly by the Telephone Co. but by a different subsidiary corporation, the Electric Co. But their work and the work of their employer was an integral part of the operation of the Bell System.

We do not contend that the Electric Co. and the Telephone Co. are not separate corporations. We admit that they are. The Bell System carefully maintains the proper bookkeeping identities of its subsidiary corporations. Thus, the Electric Co. pays rent to the Telephone Co. for its offices in the Telephone Building. And the Telephone Co. pays the Electric Co. for the telephone equipment which it installs. But this careful corporate separation of right hand from left hand cannot be used to limit the rights of employees to regard the two as merely separate branches of one economic and industrial unit.

That the two are but branches of one integrated industrial enterprise is, we think, clear. Unfortunately the Courts below made no findings on that question since the application of the Idaho statute, as interpreted by the Idaho courts, does not depend on the absence of an industrial connection. On the contrary, the statute was held by the Idaho courts to apply unless the connection was such that the party picketed was a direct party to the "labor dispute."

The Supreme Court of Idaho did, however, refer to one significant fact. The Western Electric Co., it said, manufactures, in addition to telephone instruments and equipment, other products used in the transmission, reproduction and amplification of sound (R. 49). This is true. Western Electric manufactures such products and sells them in the open market. And it might be argued that picketing of the Telephone Co. in

connection with a dispute in the manufacturing departments of the Electric Co. where such products are manufactured would not, under the *Ritter's Cafe* case, be within the constitutional protection of speech.

But this fact emphasizes rather than minimizes the industrial connection which did in fact exist in these cases between the labor dispute and the picketing. The picketers here involved had a dispute with the installation department, not the manufacturing department, of the Electric Co. The Communication Equipment Workers—the union to which the petitioners belonged and the union which conducted the picketing—represented only the employees of the installation department. And the work of the installation department is the installation of exchange equipment in the offices of the various operating subsidiaries of the A. T. & T. That work is clearly an integral part of the operation of the Bell System. The fact that there are other departments of the Electric Co., engaged in supposedly separate and distinct industrial activities, serves only to emphasize that the dispute here involved concerned a department which is directly and intimately engaged in the telephone industry and in nothing else.

The distinction between the Telephone Co. and the Electric Co., upon which the petitioners' convictions were based is thus not an industrial separation. It is, insofar as this branch of the Electric Co. is concerned, a fictional separation of corporate personalities unrelated to any economic or industrial division. Such inter-corporate separations may have their place in the realm of bookkeeping and finance. But they have no place, under the decisions of this Court, in defining the economic area in which workingmen have a constitutional right to publicize their dispute by picketing. And it follows, that the petitioners, as employees in dispute with the installation department of the Electric Co., had a right to picket the Telephone Co. and that a criminal conviction for doing so, under any statute, should not be allowed to stand.

3. Even if we assume that picketing by the petitioners against the Telephone Co. would not have been constitutionally protected, the conviction here cannot stand since the Idaho statute was applied in the present case to picketing by the

petitioners of the premises of their own corporate employer, the Electric Co.

The Electric Co. had its local headquarters in the Telephone Building. Its work was done in the Telephone Building. The only place at which the petitioners could peacefully picket the Electric Co. was in front of the Telephone Building. Yet, because that building also housed the Telephone Co. the petitioners' peaceful picketing of that building was labelled criminal by the Idaho statute, and by the Idaho Supreme Court.

In justifying the constitutionality of the statute, as thus applied to picketing by employees of their own employer (who *was* party to a labor dispute) the Idaho Court noted (R. 48) that the signs carried by the pickets did not indicate specifically that it was the Electric Co., rather than the Telephone Co., with which the petitioners had their dispute. Concededly, the signs did not observe this corporate distinction.[*] They stated simply that the National Federation of Telephone Workers were on strike for a decent wage against the Bell System. This, as we have already noted, corresponds to the economic realities of the dispute. It can be labelled incomplete only if pickets are required to ignore the substance of the economic conflict in which they are engaged and to limit their expressions by the niceties of intra-corporate distinctions contrived by the American Telephone and Telegraph Company.

But, even if we pass this point and assume that some action would properly have been taken by the State of Idaho to compel the picketers to observe the proper corporate distinctions on their signs, or to cease picketing, still the criminal convictions here should not be allowed to stand.

The convictions were not based—and could not be based, under the statute—on any charge that the signs were misleading. The use of misleading signs is not made a crime by Ch. 265. Nor did the complaint charge that the petitioners carried misleading signs. To the contrary, the statute makes

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[*] In this connection it may be observed that the Electric Co. employees used the same signs that they previously had used jointly with the Telephone Co. employees. The reason for this may be surmised from the fact that the picketing here involved occurred on May 15, 1947, the same day on which, as of 12:01 A.M., the Telephone Co. strike was settled.

any picketing, however painstakingly accurate the signs may be, a crime if it causes injury to any person other than the particular employer involved in the "labor dispute." And the charge against the petitioners was simply that they had caused injury to the Telephone Co.

Although the Idaho Supreme Court did seem to say that the injury to the Telephone Co. was caused by reason of the failure of the signs to specify "Western Electric," it went on to state the statutory rule in such a way that the omission was immaterial. If, said the Court, two employers use a common entrance, the employees of one such employer, if they are engaged in a "labor dispute" with him, "had the right to picket as a form of free speech as against their employer but they had no right to picket in such a way as to injure someone else not a party to that labor dispute, in violation of the statute."

The picketers are thus not merely required to be accurate or to take affirmative measures to prevent such injury. They are absolute insurers. They must conduct their picketing in such a way that no damage is in fact done to the other employer. If such damage does result, then picketing becomes, because of that fact alone, a violation of Ch. 265 and a crime. The effect, not the reasonable probability of that effect because of an omission from the signs, is the test.

Indeed, if the Idaho Court had rested its affirmance on the supposed causal effect of the omission of "Western Electric" from the picketers' signs, it would clearly have been a denial of due process of law. *Cole* v. *Arkansas*, 333 U. S. 196, 201. The petitioners were not charged with causing injury to the Telephone Co. by using misleading signs. Nor were they tried on any such theory. There is no evidence in the record that the cause of the injury to the Telephone Co. was the omission of "Western Electric" from the picketers' signs and the stipulation as to the facts contains nothing from which such an inference can be drawn.

Indeed, the facts as stipulated lead to the contrary inference. The damage to the Telephone Co. occurred because its employees refused to go to work during the continued existence of the dispute with its alter ego, the Electric Co. Certainly,

they, of all people, could not have been confused by the signs. They knew that their own strike was over, else they would not have come to work at all on that first day, and it can safely be assumed that their conduct would not have differed in the slightest if the petitioners' signs had specified "Western Electric." Certainly the contrary could not constitutionally be assumed on appeal without affording the petitioners an opportunity to offer evidence on the point.

A fair reading of the statute, the record, and the opinion of the Idaho Supreme Court indicates without question that the crime for which the petitioners were convicted was not based on any supposed misleading effect of the picketing. The only crime which was charged and the only act made criminal by the statute is picketing which has the effect, irrespective of its peacefulness or truthfulness, of causing injury to a person not a party to a "labor dispute." The injury is all that matters. What the signs say is immaterial. If the petitioners had offered evidence to prove that the telephone operators knew that the dispute was limited to the Electric Co., the offer would have been rejected as irrelevant. And if the signs had stated, in bold type, that the dispute was limited to the Electric Co., a separate corporation, the picketing would nevertheless have been criminal if it injured the Telephone Co.

The statute, as so construed and applied, is, we submit, the grossest kind of restraint on freedom of expression. It is not a matter of insuring truth of even of requiring, in cases where there is a common entrance, that the picketers disclose the limited nature of their dispute. The statute does not have that effect. It has the effect, rather, of restraining in advance any picketing which may cause injury, no matter how truthful the signs, to persons using the common entrance. Under the Idaho statute as applied here, you picket your own employer at your peril. If it turns out that someone else is injured by our publicity, then the publicity is a crime and the picketers are criminals, irrespective of the existence of a "labor dispute" and irrespective of the peaceful or truthful nature of the publicity.

4. The Idaho statute violates the Fourteenth Amendment for yet another reason. It is a criminal statute but it does

not specify, with any degree of certainty, what conduct is proscribed.

In the Idaho courts the petitioners pointed out that Ch. 265 made picketing criminal which injured anyone not a party to a "labor dispute" but did not define "labor dispute." The Idaho Supreme Court answered this contention by importing into Ch. 265, for the first time, the definition of "labor dispute" contained in an amendment to the state's anti-injunction statute, Ch. 266 of the 1947 Session Laws.

We think, with the Chief Justice of the Idaho Supreme Court, that this was doubtful statutory interpretation. But that is a matter for the Idaho Courts. What is important, for this Court, is that this importation fails to serve its purpose and leaves the criminal statute still unconstitutionally vague and uncertain in the extent to which it limits expression by means of picketing.

Ch. 266, which contains the definition of "labor dispute," is an amendment to Ch. 7 of Title 44 of the Idaho Code. That chapter provides that no court shall have jurisdiction to issue an injunction in any case "involving or growing out of a labor dispute, as herein defined" except under certain circumstances. The definition thus referred to is contained in Section 44-712, which was amended by Ch. 265 of the 1947 Session Laws. The definition, as amended, provides that:

> "The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives."

This definition may be adequate for equity purposes. In the context of the anti-injunction statute it means that a complainant who seeks an injunction must show, before an injunction can issue in the absence of the requirements of Ch. 7, that the case does not involve a controversy concerning collective bargaining between an employer and the majority of his employees in a collective bargaining unit. It may be uncertain, in any given case, whether the controversy in fact involves a majority of the employees. Or, if the controversy involves a majority of a certain kind of employee, it

may be uncertain whether those employees constitute a "collective bargaining unit." Or it may be unclear whether the controversy is one which falls within the scope of "the right or process or details of collective bargaining or the designation of representatives." These uncertainties, however, must be settled by the enjoining court before an injunction can issue. And when those uncertainties are settled in the particular case and an injunction is issued, then the conduct proscribed will be stated in the Court's order and the parties enjoined will be on notice that their controversy does not come within the scope of the definition of "labor dispute."

The definition, however, is totally inadequate when imported into Ch. 265, a criminal statute. Under Ch. 265, there is no prior injunctive proceeding. A person who desires to picket must be able to determine, from the words of the statute alone and without warning from a court, whether his controversy is a "labor dispute." To so determine he must know whether a majority of the employees are involved in the dispute—a fact which is often unknown in labor controversies until an election is held, and which may depend on whether certain striking workers are considered employees. He must know, if only a certain craft is concerned in the dispute, whether that craft constitutes a "collective bargaining unit" —which is not a fact, but a legal conclusion which such organizations as the National Labor Relations Board have, at times, great difficulty in determining. Finally, if the controversy concerns provisions for union security, for example, he must know whether it is one which concerns "the right or process or details of collective bargaining"—a standard which is, to say the least, unclear.

All these things must be known before a workingman can determine whether he is involved in a "labor dispute." And the statute, being a criminal one, requires him to make each determination correctly else he will be subject to criminal prosecution if he pickets.

This is not all. Having determined that he is involved in a "labor dispute," a workingman must then determine whether his picketing will cause "injury" to any one not a party to the dispute. How far this injury criterion is to be carried

he is not told. If the plant shuts down because of the picketing and one worker, who does not wish to strike, thus loses pay, is the picketing a crime? What if other employers who supply materials to or purchase products from the picketed plant lose business. Will their injury make the picketing criminal? What of employees of such firms who may be laid off?

If such effects do constitute "injury to one not a party to the particular labor disputes," how is a picketer to determine whether such effects will or will not occur and thus make his picketing criminal? To compel him to guess, on peril of indictment, and to divine prophetically what the reaction of only partially known factors will be, is certainly to impose an unconstitutional burden. *International Harvester* v. *Kentucky*, 234 U. S. 216, 223.

Perhaps the legislature did not intend to make all picketing criminal which had such secondary or unintended economic effects. But if it did not so intend, it provided no line which can be discerned to distinguish the criminal effects from the non-criminal, the criminal picketing from the non-criminal. And a statute which gives no indication as to what conduct is or is not criminal certainly does not constitute due process of law. *Pierce* v. *United States*, 314 U. S. 306, *Cantwell* v. *Connecticut*, 310 U. S. 296.

The short of the matter is that the Idaho statute is either an unconstitional blanket prohibition against all picketing (*Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106) or, if it be regarded as only a prohibition of some picketing, the standards that it sets up are so indeterminate that it is impossible for a workingman to determine in advance whether his publicity will fall within the forbidden or the permissible category. Such uncertainty, in a criminal statute which limits a form of expression, is clearly violative of the Fourteenth Amendment, *Winters* v. *New York*, 333 U. S. 507.

To paraphrase the words of the late Mr. Justice Rutledge in *Thomas* v. *Collins*, 323 U. S. 516, 535, the vice of the Idaho statute is not only that the picketing which it actually prohibits is speech, it is also that this prohibition re-

strains speech which is not or may not be forbidden. The sharp line cannot be drawn surely or securely. The effort to observe it could not be free speech. The statute's effect, as applied, in a very practical sense is to inhibit all picketing in all circumstances.

Such a statute, clearly, ought not to be permitted to stand against constitutional attack.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1949

No. 358

J. S. CASSELMAN, JAMES D. TOWNE, J. E. ABEL AND GEORGE HILL,

Petitioners

v.

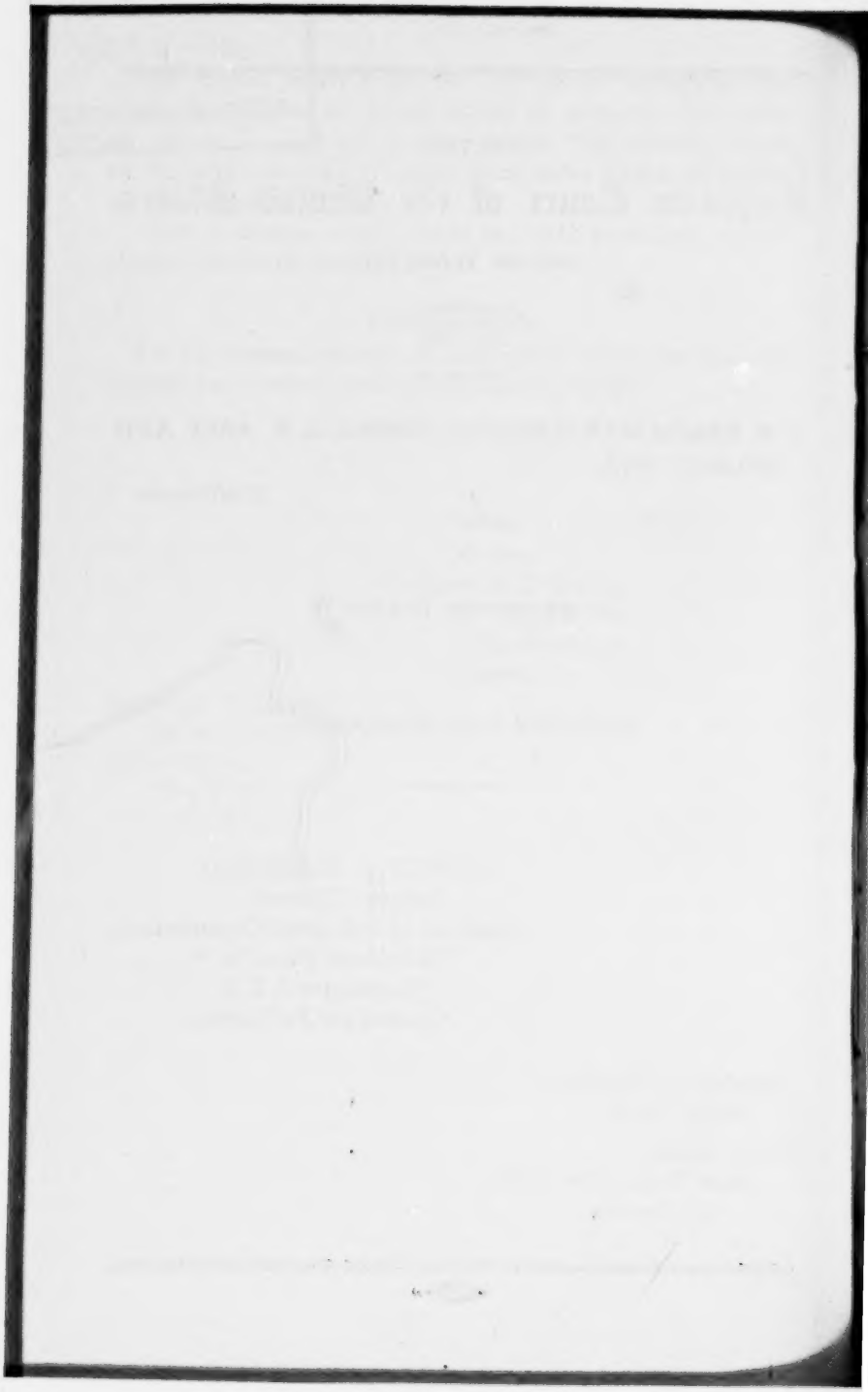
STATE OF IDAHO

PETITION FOR REHEARING

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STATE OF IDAHO

PETITION FOR REHEARING

J. S. Casselman, James D. Towne, J. E. Abel and George Hill, the petitioners herein, pray that the court reconsider its denial of their petition for certiorari and, on rehearing, grant said petition.

The petition for certiorari was filed on September 29, 1949. It was denied on December 12, 1949. On December 22, 1949, the Chief Justice extended the time in which to file a petition for rehearing to and including January 9, 1950.

GROUNDS UPON WHICH REHEARING IS ASKED

The petitioners present herein three separate grounds for rehearing of their petition for certiorari:

(1) The granting of the petitions for certiorari in Nos. 309, 364 and 449 in which the same constitutional issues sought to be raised herein are presented.

(2) The actions of the subsidiaries of American Telephone & Telegraph Company taken on or about November 21, 1949, while the petition herein was pending, which clearly show

the integrated employment practices of the Western Electric Company, the petitioners' nominal employer, and the Mountain States Telephone & Telegraph Company, the "third person" whose injury made the petitioners peaceful picketing a crime under the Idaho statute.

(3) The fact that Mr. Justice Douglas was absent and three of the eight justices participating noted their dissent from the denial of the petition for certiorari, which fact, we submit, should provide a basis for a rehearing of the petition before a full bench.

None of these three points have previously been presented to the court and this petition, therefore, complies with the provisions of Rule 33 (2) of the Rules of this Court.

I.

The granting of the Petition for Certiorari in Nos. 309, 364 and 449 is a proper basis upon which to grant the petition for certiorari herein. It will be recalled that the Idaho statute, under which the petitioners were criminally convicted because of their peaceful picketing, provides that "It shall be unlawful to cause . . . injury to one not a party to the particular labor dispute, . . . by picketing." These words, selected from the statutory context by the Supreme Court of Idaho (R. 48), define the offense for which the petitioners were tried and convicted. In the petition for certiorari, it was contended that this statute violated the 14th Amendment because, among other things, (1) it made all effective picketing unlawful in the absence of a "labor dispute" as defined by state law (Petition, pp. 6-11); (2) it made peaceful picketing unlawful, even where there was a "labor dispute," if the picketing had the effect, intended or unintended, direct or indirect, of causing injury to a third person, irrespective of the industrial or economic relationship, of that third person to the employer involved in the labor dispute (Pet., pp. 11-13).

On December 19, 1949 the court granted certiorari in three cases: *International Brotherhood of Teamsters* v. *Hanke,* No. 309; *Automobile Drivers* v. *Cline,* No. 364; *Building Service Employees* v. *Gazzam,* No. 449. Counsel for the petitioners, in the time made available by the court,

have examined the papers in these three cases. All three seem to raise one common point: whether a state may, consistently with the 14th Amendment, enjoin picketing for the sole reason that there is no labor dispute, as defined by state law, involved.

This is the only "Question Presented" by the petitioners in the *Hanke* case (Petition, No. 309, pp. 7-8); it is the only "Question Presented" by the Petitioner in the *Cline* case (Petition, No. 364, p. 8); it is the first of the "Questions Presented" by the petitioner in the *Gazzam* case (Petition, No. 449, p. 8).

The three cases, of course, present differing factual backgrounds. But in each of them peaceful picketing was restrained by the state court because of the absence of an immediate relationship of employer and employee between the picketers and the person picketed, and certiorari was requested on the ground that the prevention of peaceful picketing by law under such circumstances constituted a violation of the Fourteenth Amendment.

The present case presents exactly the same question. This case differs only in that the restraint on peaceful picketing here involved is more serious and more inclusive. Here the restraint is not civil, but criminal. Here there is no warning to the picketers but the imposition of criminal penalties after the event. Here the picketing restrained is not only picketing in the absence of a "labor dispute," but also the picketing of persons who are involved in a labor dispute, if any one else is injured thereby. Indeed, the petitioners here were convicted of crime although they peacefully picketed the premises in which they worked and in which their employer, with whom they had a "labor dispute," had headquarters.

There is one other apparent difference between the instant case and the cases now before the court. The injunctions in Nos. 309, 364 and 449 were directed at picketing *per se*. In the instant case, the statute does not make picketing criminal, but the causing of injury by picketing. This difference, however, is immaterial. As we pointed out in our petition, all picketing which is effective causes economic injury and injury must usually be shown before picketing *per se* may be enjoined. Injury in fact was shown in *A. F. of L.* v. *Swing*, 312 U.S. 321

and *Cafeteria Employees* v. *Angelos*, 320 U.S. 293, but the picketing was nevertheless held constitutionally protected. Injury was also shown in No. 309 (R. 17), in No. 364 (R. 7), and in No. 449 (R. 172). And, in each of these cases, the injury to a person not party to a "labor dispute" was, in fact, the basis for the prohibition of peaceful dissemination of information by picketing.

The constitutionality of such a prohibition is the question now before the court. The identical question is presented in the instant case. In the instant case, the question arises in more aggravated form—because the punishment is criminal, comes without warning and is applicable even where there is a labor dispute—but the question is the same.[1] This, we submit, is a sufficient basis for the granting, on rehearing, of the petition for certiorari in the instant case, *Triplett* v. *Lowell*, 296 U.S. 570, 297, U.S. 638; *Pickett* v. *Union Terminal Co.*, 314 U.S. 704, 315 U.S. 386, 394; *United States* ex rel *Eichenlaub* v. *Watkins*, 337 U.S. 955. Indeed, even if the question in this case be regarded as only "related" to the questions presented in the cases now before the Court, this is a sufficient ground upon which to grant the petition for rehearing.[2]

II.

There were three parties involved in the picketing which led to the petitioners' conviction. There were (1) the petitioners, (2) their employer, the Western Electric Co., and (3) the "third person," the Mountain States Telephone and Telegraph Co. (1) and (2) had a labor dispute. Picketing by (1) in connection with that dispute caused injury to (3), "not a party

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[1] The existence of a statute in the present case makes, of course, no difference in the constitutional question presented. It has never been suggested that action forbidden to a state by the Federal constitution may be taken by the legislature but may not be taken by the courts of the state on common law principles. To the contrary, it was not until *A. F. of L.* v. *Swing*, 312 U.S. 321, and *Shelley* v. *Kraemer*, 334 U.S. 1, that it was established beyond doubt that constitutional limitations on state action were applicable to judicial action with the same force as they are applicable to legislative action.

[2] See Boskey, *Mechanics of the Supreme Courts' Certiorari Jurisdiction* (1946), 46 Columbia Law Review 255, 261.

to the particular labor dispute," and hence was criminal under the Idaho statute.

In our petition we urged that this picketing was in fact picketing of the Western Electric Co. by its own employees who were in dispute with it, and that the ruling of the Idaho Supreme Court that such picketing was nevertheless illegal because the petitioners "had no right to picket in such a way as to injure someone else not a party to the labor dispute" was an unconstitutional limitation on freedom of speech. We also urged that, even if it be considered that the petitioners were in fact picketing the third party, the Telephone Co., such picketing was certainly within "the industry within which a labor dispute arises" (*Carpenters & Joiners* v. *Ritters Cafe,* 315 U.S. 722, 728), if any picketing ever could be said so to be, since the petitioners were employed on Telephone Co. property, installing equipment to be used by the Telephone Co., by a corporate affiliate of the Telephone Co., in a division devoted solely to such installation.

This attempt to separate the picketing analytically into either picketing of the Electric Co. or picketing of the Telephone Co. was perhaps unnecessary. Certainly the Idaho statute, on its face and as interpreted, does not make the criminality of picketing depend on who is picketed. The sole ingredients of the crime are picketing and injury to a third person. The nature of the picketing and the words on the picketers' placards are immaterial. But the analytical separation did tend to obscure the important fact that, in a substantial and economic sense, the opponent with which the strikers were in economic combat was neither the Telephone Company nor the Electric Company but the Bell Telephone System. It is not merely that the Telephone Company and the Electric Company were both subsidiaries of American Telephone & Telegraph Company (*Ritter's Cafe,* 315 U.S. 722 shows that common ownership is insufficient to constitutionally protect picketing in the absence of an industrial connection). Nor is it only that both subsidiaries are engaged in an integrated industrial enterprise (*Ritter's Cafe* and the *Wohl* case, 315 U.S. 769 would seem to show that this *is* sufficient to confer constitutional protection). Of even more significance is the

fact that employment and conditions of employment throughout the subsidiaries Bell System are completely integrated.

It is not true, as the petition may have made appear, that employment by the Electric Co. and employment by the Telephone Co. were entirely separate, and that picketing of the Telephone building by employees of the Electric Co. could only be constitutionally justified because (a) the Telephone building housed the Electric Co. and (b) the two companies were engaged in the same industry. On the contrary, wages and conditions of employment in any Bell subsidiary are of direct interest to all employees of Bell because these subsidiaries do not have independent policies but mechanically carry out the dictates of the real employer, the Bell System. The petitioners had a right to regard themselves as employees of the Bell System, to regard their strike as a strike against the Bell System, and to picket the Bell System as such in support of their strike. Settlements of disputes as regards wages and conditions of employment are substantially uniform throughout the Bell System. Employees are given the right to transfer freely from one subsidiary to another, retaining their service benefits, service records and seniority. (R. 13.) The booklet "For Your Information" [3] given to workers employed in the Installation Department of the Electric Company informed them that "having entered the Western Electric Company, you have become a member of the Bell System." The advertisement "Up From the Ranks" published by the "Bell Telephone System" demonstrates graphically that employees were in substance employees of the System, not of the subsidiaries.[4] The financial statement of the American Telephone & Telegraph Company[5] speaks at length of the employees of the Bell System and describes how the Bell System, as such,

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[3] Exhibit C, on file with the clerk.

[4] Exhibit D, on file with the clerk. This exhibit shows that Walter S. Gifford "started as a clerk with the Western Electric Co.," the President of the *New Jersey* Telephone Co. started as a clerk in *Boston*, the President of the *Wisconsin* Co. started with a *New York City* subsidiary, the President of *New England* subsidiary started in *Atlanta*, the President of the *New York* Co. started in *San Francisco*. All are described as employees of "the Bell System" who came up from the ranks.

[5] Exhibit A, on file with the clerk.

concluded a wage settlement in 1946 covering the entire system.

These facts were underlined in November 1949, while the petition for certiorari herein was pending. At that time the employees in several of the Bell Systems' subsidiaries were engaged in bargaining sessions with their nominal employers. One of the subjects of bargaining was pensions. On November 21, 1949, every one of the Bell subsidiaries, including the Electric Co. and the Mountain States Telephone Co., issued letters, identical to the last comma, announcing a unilateral change in the Bell System pension plan, and making no reference to the then pending negotiations.* That this unilateral action was a blatant unfair labor practice is not material here. What is material is that it shows again, and most clearly, that on matters of employment policy in the Bell System, the nominal corporate employer is of no significance. All employees of the operating and installation subsidiaries of the Bell System are practically and economically employees, not of the subsidiaries, but of the Bell System. And they have a common interest in matters relating to wages and conditions of employment throughout the System.

This fact, which we heretofore failed to emphasize, is a sufficient basis on which to grant certiorari herein on rehearing. The petitioners had a dispute with the Bell System. They struck against the Bell System. They peacefully picketed the Bell System. Yet, Idaho has prosecuted them criminally for that act because of the Bell System's internal corporate division, in spite of the fact that employees of the corporate subdivisions are, on matters of interest to strikers and picketers, in substance employees of the System. Since the petitioners were, in practical effect, employees of Bell, subject to Bell's employment policy, receiving Bell's wages and Bell's pensions, they had a right to strike not only against the corporate dummy but against their real employer, Bell. And they did so strike. To permit a state to punish the petitioners for the peaceful dissemination of the information that such a strike was in progress is exactly the same as permitting the prohibi-

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New York Times, Nov. 22, 1949, page 1, col. 2; *Daily Labor Report*, No. 225, Nov. 21, 1944, p. A-3.

tion of picketing against an employer unless every one of his divisions or departments are on strike. Unless the Court is prepared to abandon its whole line of decisions with regard to picketing, such a ban should not be allowed to stand against constitutional attack.

III.

The order of the Court on December 6, 1949 denying the petition for a writ of certiorari in this case carried the notation that Mr. Justice Black, Mr. Justice Reed and Mr. Justice Burton were of the opinion that the writ should be granted. The orders of the court also noted that Mr. Justice Douglas took no part in the consideration of the cases in which orders were that day announced. We respectfully suggest that this combination of factors constitutes a proper basis upon which to grant a rehearing, before a full bench, of the court's action on the petition for certiorari herein.

The procedure of the court in dealing with petitions for certiorari is prescribed neither by statute nor by rule. The court is free to grant petitions for certiorari only in those cases in which a majority desire the writ to be granted, or, if the court so desires, in all cases in which two or three Justices vote to bring the case before the court. The action in granting the petition for certiorari under either practice is the action of the court as a whole. It may please the court to grant the writ because two or three members so desire, or it may please the court to take such action only when four or even a majority so desire. In no case would a litigant have a right to demand that another rule be followed, since the court as a whole has perfect freedom to determine in what cases it will accede to the wishes of a minority of its members.

We do not, accordingly, urge that the absence of Mr. Justice Douglas, when combined with the announced votes of Justices Black, Reed and Burton in favor of the writ, gives us any right to ask for a rehearing. We do wish, however, respectfully to call certain facts to the court's attention and to suggest that in cases such as this a rehearing before a full bench would not do violence to the court's traditions—insofar as they are known to the petitioners—but would, on the con-

trary, conform to the announced principles upon which the "rule of four" is based.

Our knowledge of the court's practices is, of course, limited because the opinions of the Justices as to whether certiorari should be granted are often not announced and because the court has announced no set of rules which govern it in the exercise of its discretionary powers. The basis for the "rule of four" has, however, been officially announced on several occasions.

In hearings before the Senate Committee on the Judiciary in 1924, Mr. Justice Van Devanter, speaking as a member of the Committee of the Court, stated that "whenever the vote is relatively close the conference makes it a practice to grant the petition." In response to a query as to whether this was true when a majority were against the grant, he said: "Yes. For instance, if there were five votes against granting the petition and four in favor of granting it, because we proceed upon the theory that when as many as four members of the court, *and even three in some cases,* are impressed with the propriety of our taking the case the petition should be granted." [7] (Italics added.) In 1928 Mr. Justice Stone said that "Petitions for certiorari are granted on the affirmative vote of four of the nine Judges." [8] In 1935, Mr. Justice Van Devanter, again speaking on behalf of a Committee of the Court, stated the reason behind the rule: "The point is that in exercising the certiorari jurisdiction on the Court desires to be at fault in taking jurisdiction rather than to be at fault in rejecting it." [9]

This rationale would seem to suggest that, when less than nine Justices participate in the decision to grant or deny certiorari, rigid adherence to the requirement that four votes are necessary for a grant would be inappropriate. Thus, if only seven or six Justices participate, the purpose of the "rule of four" would seem best served by a "rule of three" so that certiorari would be granted, in Mr. Justice Van Devanter's words, "whenever the vote is relatively close."

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[7] Hearings before the Committee on the Judiciary, United States Senate, on S. 2060 and 2061, 68th Cong., 1st Sess. page 29.

[8] 14 American Bar Ass'n Journal 428, 436.

[9] Hearings before the Committee on the Judiciary, United States Senate, on S. 2176, 74th Cong., 1st Sess., pp. 9-10.

In the present case eight Justices participated. We do not urge that in such cases the vote of three should be sufficient to grant certiorari. But we do suggest that where three Justices are of the opinion that certiorari should be granted and where the ninth Justice is temporarily absent from the bench, the purpose of the "rule of four" would be served if the court should, on application, rehear the petition for certiorari before the full court.

We are not urging, be it noted, that the absence of a Justice is a proper basis upon which to request a rehearing of a decision by the Court on the merits, although the granting of the petition for rehearing in *Marzani* v. *United States*, 336 U.S. 910, might be argued to be precedent for such a contention. We recognize that litigation must be ended and that the court's work cannot be suspended because of the absence of a Justice. We recognize, furthermore, that the Judicial Code, in providing that six Justices shall constitute a quorum (28 U.S.C. 1) provides, in effect, that a Court so constituted shall be competent to finally determine the matters before it despite the absence of one or more members.

But the action of the court in granting or denying a petition for certiorari is a different matter. As the court itself has frequently pointed out, "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case" (*United States* v. *Carver*, 260 U.S. 482, 490). The decision to grant certiorari similarly does not imply a decision on the merits. It is, simply, an exercise of the Court's discretionary power to hear the case on the merits. In exercising that discretion, the Court has the greatest flexibility and we suggest, respectfully, that in all fairness to litigants before the Court the temporary absence of one Justice should be a proper basis upon which to grant a rehearing before the full bench where the vote of that Justice will be decisive as to the granting or denial of the writ.[10]

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[10] Insofar as we are aware, this suggestion has never been passed upon by the Court. In a number of cases before a full bench, three Justices have noted that in their opinion the writ should be granted. See, e.g., *Simmons* v. *Peavy-Welsh Lumber Co.*; *Helvering* v. *Sprouse*, 315 U.S. 810. In at least two cases such opinions have been noted when only eight Justices participated. *Scarborough* v. *Pennsylvania R. R.*, 326

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for rehearing should be granted and, on rehearing, certiorari should be granted.

Respectfully submitted,

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I certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Par. 2 of Rule 33 of the Rules of this Court.

Arthur J. Goldberg

U.S. 755; *International Union* v. *United States*, 338 U. S. 871. In the latter case, Mr. Justice Clark presumably disqualified himself, since he was on the bench at the time the petition was ruled on. In the former case, Mr. Justice Jackson was absent during the entire term of Court in which the petition was acted upon and, in any event, no request for a decision by a full court was made in the petition for rehearing.